EXHIBIT A

Socony Mobil Oil Corporation v. *Belveal*
Cite as 430 S.W.2d 529

Opinion

PRESLAR, Justice.

This is an appeal from an order granting the motions for summary judgment of the plaintiffs, Marion J. Belveal, Golda Belveal Branom, joined by her husband, Dudley Branom, Price M. Belveal, Martin E. Belveal, Will Wyler, Ernest Wyler, and Eldabell McKenzie joined by her husband, R. I. McKenzie, individually and as heirs of Myrtle Belveal, deceased, Ida Oberg, deceased, and Milda Wyler, deceased, against defendants Mobil Oil Corporation, Charles B. Athey and Jack D. Hodgden. All defendants appeal from such judgment, and additionally Mobil Oil Corporation assigns error in the failure of the court to grant its motion for summary judgment.

The order granting the plaintiffs' motions for summary judgment is reversed and remanded for trial, and the order is reversed and rendered as to that portion of Mobil Oil Corporation's motion for summary judgment which pertained to the cancellation of its oil and gas lease.

[1] The plaintiff-appellees in their petition alleged:

> "Plaintiffs bring this suit to set aside certain deeds and to recover possession and title to certain property which was taken from them by the fraud of defendants and which property defendants still fraudulently retain.
>
> "Plaintiffs claim that they are entitled to ownership, title and possession of the following interest in lands and are entitled to have certain deeds set aside

and to have adjudication of or reconveyance to them of ownership, title and possession of the following interest in lands: * * *"

They then pleaded their title from the sovereignty of the soil, maintained that the court had jurisdiction of the out-of-state defendants under Article 1975 (because the suit was one for an interest in land), and they prayed for an award of title and possession. Their motions for summary judgment recite that they are based on their pleadings. Plaintiff-appellees, by their motions for summary judgment action, did not offer proof of their chain of title, superior title from a common source, nor did they offer proof negating the "not guilty" and specially pleaded defenses. Defendants urge that this is fatal to the judgment entered, and they urge that they were entitled to all defenses allowed by their "not guilty" pleas and their specially pleaded defenses of laches, limitations and prior uncanceled deeds between the parties. Plaintiffs now disavow the trespass to try title action and maintain that the judgment can stand solely on their action for cancellation of the deeds under the claim of fraud and breach of fiduciary relationship. The judgment ordered cancellation of the deeds, ordered the defendants to execute various deeds to plaintiffs and their attorneys, and ordered the defendants to account for rents and revenues accrued during their possession. Thus the plaintiffs obtained all which they could have obtained under the trespass to try title count, and much argument is presented as to whether this was or was not such an action. Since plaintiff-appellees now urge that theirs is not a trespass to try title action, in the face of such abandonment it is probably unnecessary to consider such form of action as supporting the summary judgment rendered. *But* they also seek to rely on legal reasons to support the judgment—deeds improperly notar-

ized and acknowledgments of some deeds by a party in interest—and they seek to show their establishment of a chain of title by reference to their pleadings. As to that, suffice it to say that pleadings are not the character of proof required for summary judgment. Rule 166-A, Texas Rules of Civil Procedure. In Land v. Turner, 377 S.W.2d 181 (Tex.1964), the Supreme Court summarized the burden of plaintiffs-appellees under this count:

> "To recover in trespass to try title, the plaintiff must recover upon the strength of his own title. Hejl v. Wirth, 161 Tex. 609, 343 S.W.2d 226 (1961). He may recover by (1) proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession, and that the possession had not been abandoned."

Each of these is an independent ground of recovery, but none of them were proved in the summary judgment action before us, so that the judgment cannot stand on such grounds in any event, whether abandoned or not.

[2, 3] Plaintiffs pleaded and admitted the execution and delivery of the deeds, their acceptance and retention of the consideration, and the present possession of the lands by the defendants. They contend that they should not be bound by them because of a form of fraud arising out of the deeds having been delivered in blank as to the grantee, the insertion of the name of defendant Athey as such grantee, and the existence of a fiduciary relationship between them and Athey. Stripped of the trespass to try title count, the plaintiffs' cause of action is one for cancellation of deeds by the grantors for fraud. Yet the judgment goes farther. It first cancels the seven deeds in which the plaintiffs are grantors and Athey is the sole grantee. It then orders Athey and the other defendants to execute deeds

of special warranty to the plaintiffs and their attorneys, and to execute certain deeds between the various defendants, some conditioned on the delivery to the clerk of the court of other deeds, apparently to make up deficiencies and correct inequities among those defendants who were strangers to the canceled instruments, but deraigned their title thereunder. The various defendants were ordered to account for rents and revenues accrued during their possession, and in turn were to receive back out of such funds the consideration paid for their deeds. This being a summary judgment case, when we speak of the evidence or proof throughout this opinion, it will mean that we have viewed same in the manner required under Rule 166-A, T.R.C.P., as to which see Great American Reserve Ins. Co. v. San Antonio Pl. Sup. Co., 391 S.W. 2d 41 (Tex.1965). If we assume that the proof was sufficient to warrant cancellation (but we expressly find that it was not), the judgment rendered cannot stand, for it goes beyond cancellation and, in effect, grants recovery as though in trespass to try title. Cancellation was a necessary preliminary step to recovery of the land. Chicago T. & M. Ry. Co. v. Titterington, 84 Tex. 218, 19 S.W. 472; Deaton v. Rush (1923), 113 Tex. 176, 252 S.W. 1025. But the establishing of an equitable right—that they were entitled to cancellation—and the simple act of cancellation, could not operate to take the land away from all who were in possession under claims of title and restore it to plaintiffs. As a very practical matter, the solemn act of canceling the deeds—that they "be set aside, voided and held for naught"—left nothing to be conveyed, as thereafter ordered by the judgment, and certainly nothing to warrant as title.

[4-7] Very simply stated, the suit was for cancellation, but the judgment was for complete recovery of the land, and it was against all parties claiming an interest

therein. Athey was the only defendant who was a party to the canceled instruments. The other defendants were in possession under duly recorded deeds. Not being a party to the instruments sought to be canceled, they could have been made parties to the conflict only because of their interest in the land. Clearly, then, the judgment operates as an adjudication of title to an interest in land. These strangers to the canceled instruments, who were in possession under deeds of record, have had their title and possession taken from them in a summary proceeding seeking cancellation. Such an action to cancel a voidable deed is characterized as an in personam action, rather than a suit for recovery of land. Deaton v. Rush, 113 Tex. 176, 252 S.W. 1025; Glenney v. Crane, 352 S.W.2d 773, ref., n. r. e.; (but see Free v. Owen, 131 Tex. 281, 113 S.W.2d 1221). Regardless of its characterization, it cannot operate to deprive these defendants of their title and possession without an adjudication of the basis of their claims to such title. We think the judgment is also erroneous for that reason. Rule 789 provides that "Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded." This is held to include both legal and equitable defenses. Smith v. Baker (Civ.App.1964), 380 S.W.2d 725; ref., n. r. e., 383 S.W.2d 570. And where the defendant pleads "not guilty", the burden is on the plaintiff, as movant for summary judgment, to show that the defendant had no such defenses. Briggs v. Freeway Park Development Company, Tex.Civ.App., 366 S.W.2d 270, ref., n. r. e.; Gage v. Owen, Tex.Civ.App., 396 S.W.2d 189, n. w. h.; 56 Tex.Jur.2d, "Trespass to Try Title", p. 248, § 119.

[8] We are of the opinion that the prior uncanceled deeds, pleaded by the defendants, is a bar to the judgment rendered. Two sets of deeds were executed by the plain-

tiff-grantors in this transaction. These deeds were identical as to the parties and properties, except that one set was on "Oklahoma forms", while the other set was on "Texas forms". This suit sought cancellation of the "Texas form" deeds only. When the transaction for the purchase-sale of the property was originally consummated, the deeds (seven in number) of the grantors were executed and delivered on the printed Oklahoma forms and the consideration of $100,000.00 was paid. About a week after the delivery of these deeds, on the suggestion of one who acquired an interest thereunder, seven new deeds were executed and delivered on printed Texas forms by all parties grantors. Both sets of deeds were executed in blank as to the grantee, the name of defendant Athey was inserted as grantee by him on these Texas form deeds, and they were thereafter filed for record in Pecos County. The Oklahoma form deeds still remain in the possession of Athey, uncanceled, and unchallenged in fact, and of a form sufficient to pass title fully under Texas law. Perhaps the situation is as simple as this: "A" having given two deeds to "B" conveying Whiteacre, and having sought cancellation of only one of them, has gained nothing, for the other deed is still outstanding until canceled, even as was the one canceled. Whalen v. Richardson, Tex.Civ.App., 353 S.W.2d 941, n. w. h., cites the controlling rule of law:

> "A deed obtained by fraud is not void but voidable only as between the parties to this suit, appellee's title is prima facie good, and it could only be avoided by decree annulling and cancelling the deed executed by appellants. Deaton v. Rush, 113 Tex. 175, 252 S.W. 1025; Michna v. Crane, Tex.Civ.App., 28 S.W.2d 837; Wilkins v. Abercrombie, Tex.Civ.App., 162 S.W.2d 445; Meiners v. Texas Osage Cooperative Royalty Pool, Inc., Tex.Civ.App., 309 S.W.2d 898."

[9] The judgment is also erroneous in that there is an absence of necessary parties, which absence was raised by pleas to abate, and was not cured by the unilateral stipulation of the plaintiffs (referred to as paragraph 31 of their pleadings) as to any innocent purchasers for value.

On the basis of the foregoing, the judgment granting appellee-plaintiffs' motions for summary judgment is reversed and the cause remanded for trial.

MOBIL'S MOTION FOR SUMMARY JUDGMENT

[10] In addition to granting plaintiffs' motions for summary judgment, the judgment here appealed from also denied the motion for summary judgment of Mobil Oil Corporation. By such motion Mobil contended that an oil and gas lease owned by it on a portion of the land involved was a valid and existing lease, and that the fee title it obtained to an undivided interest in the property should be upheld because it was an innocent purchaser for value. The granting of plaintiffs' motion for summary judgment, as noted, ordered the reconveyance of the fee title, and such order also ordered the cancellation of an oil and gas lease under which Mobil was operating and producing, and declared the interest unleased as of March 20, 1962. The premises being in and a part of a unitization agreement, the order also substitutes the plaintiffs as members of such unit from the beginning and effective date of such unitization. Our reversal of such summary judgment order sends the matter back for trial, but we are of the opinion that nothing more remains to be determined as to the cancellation of the oil and gas lease of Mobil, and that Mobil is entitled to judgment of rendition under its motion for summary judgment asking that the lease be declared valid. The original lease was for a ten-year term begining March

19, 1952. On May 19, 1961, some ten months prior to expiration of the primary term, Charles Athey, individually, as trustee for others not parties hereto, and as attorney in fact for the plaintiffs and others, executed an extension agreement, extending the lease for a term of two years. It is this extension agreement which the plaintiffs attacked on the grounds that it was secured through fraud and conspiracy or that Athey was without authority to extend the lease. We think the proof offered overcomes both of these contentions. Any and all acts relied on to establish fraud occurred long after the execution of the extension agreement on May 19, 1961, and there is no fact question as to fraud in the execution. The power of attorney under which Athey acted was executed by plaintiffs and other interest owners and placed of record in 1960. It provides Athey with the power to lease for such terms and prices as he sees fit, but does not specify that he can extend leases. We think the powers given are sufficient to cover the extending that was done here, for the instrument gave Athey the power to do any and everything about the premises which the grantors could do; also, in effect, the extension agreement was a lease. Even if the power did not exist in the instrument itself, the plaintiffs have accepted the benefits of the extension agreement, thus ratifying what was done.

EXHIBIT B

IN THE SUPREME COURT OF TEXAS

December 31, 1968

No. B-1116

Marion J. Belveal et al.

vs.

Socony Mobil Oil Corporation et al.
From Pecos County, Eighth District.

(Filed March 11, 1969)

Application of petitioners for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Marion J. Belveal et al., pay all costs incurred on this application.

EXHIBIT C

March 5, 1969

No. B-1116

Marion J. Belveal et al.

vs.

Socony Mobil Oil Corporation et al.
From Pecos County, Eighth District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 5th day of March, 1969.

Garson R. Jackson, Clerk
By /s/ Jewell Seeliger, Deputy
Mrs. Jewell Seeliger

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, J. W. Florence, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on two pages, is a full, true and correct copy of the original orders of the Supreme Court of Texas in the case numbered and styled:

B-1116, Marion J. Belveal, et al. vs. Socony Mobil Oil Corporation, et al.,

as the same now appears of record in Volume 15, at Pages No's. 210-211 of the Minutes of this Court.

IN WITNESS THEREOF I Hereunto set my hand and affix the seal of said Court at El Paso, this the 13th. day of May, A.D. 1969.

/s/ J. W. Florence
(Seal) J. W. Florence, Clerk

EXHIBIT D

APPENDIX "A"

"No. 3583

MARION J. BELVEAL, ET AL vs. SOCONY MOBIL OIL COMPANY, INC., ET AL	In the District Court of Pecos, County, Texas 83rd Judicial District

Plaintiffs' Motion for Discovery

TO THE HONORABLE C. E. PATTERSON, JUDGE OF SAID COURT:

Now come MARION J. BELVEAL, GOLDA BELVEAL BRANOM, joined by her husband, Dudley Branom, PRICE M. BELVEAL, MARTIN E. BELVEAL, WILL WYLER, ERNEST WYLER and ELDABELL McKENZIE, joined by her husband, R. I. McKenzie, individually and as heirs of MYRTLE BELVEAL, deceased, IDA OBERG, deceased; and MILDA WYLER, deceased, hereinafter called Plaintiffs, by and through their attorneys of record, and present this, their Motion for Discovery and production of documents and things for inspection, copying, or photographing, and for grounds would show the Court as follows:

1.

In Plaintiffs' Second Amended Original Petition, in paragraph No. 8, plaintiffs make the following allegations:

> 'Plaintiffs allege that the Defendant, J. K. Brim, Jr., was employed by Defendant, Socony Mobil Oil Company, Inc., as a landman over a period beginning February 26, 1952, and ending with Defendant's resignation of January 15, 1963. In the last years of Defend-

ant's employment he served as Division Staff Landman; and, in such capacity, either supervised the purchase by other landmen or brokers of oil, gas and mineral leases and other mineral interests in particular areas assigned to his district, or personally acquired such interests for Socony Mobil Oil Company, Inc. When given the outline of areas in which Socony Mobil Oil Company, Inc., desired to acquire such mineral interest, Defendant, J. K. Brim, Jr., would perceive from information which he received as a result of geological and geophysical studies made by other persons in Socony Mobil Oil Company, Inc.'s employ that such areas assigned to J. K. Brim, Jr., for the acquisition of mineral interests appeared to be most favorable for the production of oil, gas and other minerals, and under all of the circumstances the said J. K. Brim, Jr., was a vice principal of the Defendant, Socony Mobil Oil Company, Inc., so that the fraud of the said J. K. Brim, Jr., was and is imputable to the Defendant, Socony Mobil Oil Company, Inc. In this connection, Plaintiffs allege that in the course of conducting such business in Texas, Defendant, Socony Mobil Oil Company, Inc., maintains in Midland, Texas, and elsewhere in said state, large staffs of geologists, geophysicists, engineers, petroleum engineers, landmen, and other technical experts for the purpose of enabling it to explore various areas throughout the State of Texas so as to determine the location of underground structures which indicate the presence of possible deposits of oil, gas and other minerals, it being the function of these agents and employees to advise and inform the Defendant, Socony Mobil Oil Company, Inc., of their findings and conclusions, including recommended acquisition prices, to the end that the Defendant, Socony Mobil Oil Company, Inc., may successfully carry on its business. Defendant, Socony Mobil Oil Company, Inc., expends large sums of money, not only in the maintenance of its staffs of employees and agents, but in exploring and drilling for oil, gas and other minerals and in producing,

treating, transporting, refining and marketing the same, and the information derived from this work and from the advice, counsel and conclusions of Defendant's agents and employees was made available by the Defendant, Socony Mobil Oil Company, Inc., to the Defendant, J. K. Brim, Jr. The Defendant, J. K. Brim, Jr., had access to all of the above information with reference to the procurement of geological, geophysical and other technical information with the view of locating land that includes structural conditions favorable to the deposit of oil, gas and other minerals, and for the purpose, among others, of defining or outlining an area within which Defendant, Socony Mobil Oil Company, Inc., desired to acquire oil, gas and mineral leases, fee lands, oil, gas and minerals in fee, and other mineral interests. Information as to the exact ground locations as to such a defined or outlined area was in the usual practice of Defendant, Socony Mobil Oil Company, Inc.'s business, furnished to landmen employed by the Defendant, such as the Defendant, J. K. Brim, Jr., in order that said Defendant could acquire such oil, gas and mineral interest within the designated area or areas, whether by acting directly or through an agent known as a broker.'

The foregoing allegations are material. The proof of such allegations is of vital importance to the determination of the ultimate issues in this lawsuit.

2.

Defendant, Socony Mobil Oil Company, Inc., has in its possession by and through its agents, servants, employees and attorneys, documents and things which constitute or contain evidence material to matters involved in this action and which are in the possession, custody or control of Defendant, Socony Mobil Oil Company, Inc.

On December 17, 1964, at Pecos, Texas, in the United States District Court in Civil Action No. 3932, styled Socony Mobil Oil Company, Inc. v. J. K. Brim, Jr., wherein Socony Mobil Oil Company, Inc. was represented by Mr. Tom Sealy and Mr. W. B. Browder of the firm of Stubbeman, McRae, Sealy & Laughlin, Midland, Texas, the following testimony was given by Mr. J. K. Brim, Jr. in response to questions propounded by Mr. Browder:

> 'J. K. Brim, Jr., as Staff Landman from May 19, 1960, until the time his employment ceased, which was February, 1963, had as a part of his job the following duties: "Counsels the Division Landman in the evaluation of land acquisition proposals," "Keeps abreast of land developments and activities of competitors through appropriate industry contacts and interprets the significance of these developments as they relate to Mobil Oil". "Acts for the Division Landman when so designated", "Attends regular exploration department conference thrice weekly and assists Division Landman in securing data pertaining to acquisition and disposition of oil and gas properties . . ."'

At these exploration department conferences there was discussed in Brim's presence:

> 'A wide range of things, everything from rumored acquisitions the company was making to rumored acquisitions the other companies were making, and the current status of the exploration program, and how some field was doing of Mobil's, just everything.'

He discussed the proposed drilling program of Mobil; he would at times have geophysical maps explained to him; at times he would have geological information explained to him. Furthermore, he was

> 'Responsible to the Division Landman for sound advice and counsel pertaining to recommendations for land and lease acquisitions.'

This continued until 1963 and involved areas in Pecos County, Texas. These duties are fully described in a document entitled 'Executive Position Description for Staff Landman, Incumbent J. K. Brim, Jr., of May 19, 1960.' This document was produced by Socony Mobil Oil Company, Inc. in Federal Court in the above styled action and marked as Plaintiff's Exhibit 29 and Defendant, Socony Mobil Oil Company, Inc. still retains in its possession copies of such document.

There is another document which in Federal Court was marked Plaintiff's Exhibit 30, entitled 'Executive Position Description for Division Landman of May 16, 1960' which is material because J. K. Brim, Jr. at times served in the capacity of Division Landman; this document was marked Plaintiff's Exhibit 30. The Division Landman had the following duties:

> 'The Division Landman assists the Division Manager of Exploration as a staff advisor on the land aspects of exploration for crude oil and natural gas', 'Evaluates and makes recommendations to the Division Manager of Exploration on proposals that are submitted to Division by District Exploration Superintendents', 'Regularly counsels with District Exploration Superintendents, District Landmen, and other appropriate personnel on land matters', 'Attends regular Division Exploration Department conference three times per week and assists Exploration Manager in making decisions pertaining to the acquisition and disposition of oil and gas properties, related exploration matters and policies,' 'The Division Landman is responsible for recommending sound land and lease acquisitions in support of exploration programs which are designed to maintain and improve Mobil Oil's reserves of oil and gas, the ultimate resources of the Corporation', 'After analyzing and weighing the merits of proposed deals and negotiations on oil lands and leases, decisions as to the recommendations to top management to acquire or reject properties.'

4.

It was further developed at such trial in Federal Court that J. K. Brim, Jr., in his capacities as a Staff Landman, and as Division Landman, and in the course of his attendance at exploration department conferences, gained knowledge of an agreement between Mobil and Sun Oil Company providing that Mobil would drill a deep well in the Coyanosa area concerning Section 47, in Block OW, In Pecos County, Texas. Copies of such agreement are in existence; the agreement was dated June 27, 1961, and was offered into evidence in Federal Court as Exhibit 31. There was also produced in Court a letter of May, 1962, and a letter dated March 22, 1961; these letters pertain to the Mobil-Sun Oil Company agreement.

5.

At the exploration conference meetings attended by J. K. Brim, Jr., pursuant to his duties as Staff Landman and Division Landman, there were produced letters, papers, memoranda, documents, maps, surface maps, ownership maps, geophysical maps, geological maps, geological information, reports, opinions and analyses. J. K. Brim, Jr., had access to all of this information in the course of his employment for Socony Mobil Oil Company, Inc. All of this information is contained in writings, or on paper or other material substance, that can be produced, inspected, copied or photographed. All of it is in the possession, custody or control of Socony Mobil Oil Company, Inc. All of it is material evidence in this lawsuit. It is material in that it will either tend to support or tend to controvert the allegations in Plaintiff's Second Amended Original Petition, particularly Parapragh No. 8 thereof, or else it will tend to support or tend to controvert the matters of fact or conclusions of law pleaded by defendant, Socony Mobil Oil Company, Inc., and/or the other defendants in this suit.

6.

In Plaintiffs' Second Amended Original Petition, plaintiffs allege in Paragraphs No. 27 and 28 the following:

'27. Plaintiffs allege that it is not the desire of the Plaintiffs, or any of them, to sue for damages based upon the actionable fraud herein, but plaintiffs here sue for rescission of said contracts and restoration of their lands, including oil rentals and royalties. Plaintiffs plead that in the event the oil runs received since the date of said transactions can be returned to the Plaintiffs under the law without Plaintiffs making an election for damages, then in such event, and in such event only, Plaintiffs pray that they have and recover of and from all of the Defendants all rents, royalties and other matters that constitute a part and parcel of the land so being conveyed and paid to the Defendants and each of them, and in this connection, Plaintiffs allege that the Defendant, Jack D. Hodgden, and Defendant, Charles B. Athey, are non-residents of Texas, and Plaintiffs are entitled to have an accounting rendered into this Court showing the amounts of rents, royalties and other things of value received from anyone as a result of the conveyances herein complained of that are real property and constitute a part of the lands conveyed; that Defendant, Socony Mobil Oil Company, Inc., should be required to file into this Court a full and complete accounting showing all rents and royalties and all other things of value that have been paid or to be paid in the future covering Plaintiff's interest in the lands.

'28. Plaintiffs further allege that the oil runs currently being paid to the Defendants that are attributable to Plaintiffs' interest and that the acts of the Defendants and each of them in receiving said oil runs amounts to a daily willful conversion of Plaintiffs' property and Plaintiffs allege, in this connection, that as a matter of law the oil runs from said land are a part of the real property which Plaintiffs

own and are entitled to have and recover, and said oil runs are a part of their remedy for cancellation of the deeds and arises as a result of the Plaintiffs' ownership of the land and does not in any sense constitute damages, and Plaintiffs herein do not maintain in any way, nor do they seek any damages; in this connection, Plaintiffs allege that there are now five producing oil wells located upon said lands, the value of said wells runs into millions of dollars, the exact amount of which is unknown to the Plaintiffs; that the value of the interest of Plaintiffs' fraudulently procured and taken away from them by the fraud of the Defendants and each of them, as hereinabove set out, and on account of which rescission of the said deeds and restoration of said property is herein prayed for. In this connection, Plaintiffs do not know the amount of the oil runs, royalties or rents or other parts paid to the defendants as a part of their purported ownership of the land since the date of the execution of said fraudulent conveyance, but the amounts so paid are recoverable as a part of Plaintiffs' ownership of the land and may amount to enough to restore to the Defendants the consideration paid Plaintiffs, to-wit: the sum of $105,000.00, for said lands, and Plaintiffs pray that the Court appoint a receiver and that said recovery under the direction of the Court determine the amount in value of oil runs, rents, royalties and other things of value paid to the defendants and each of them, as a part of the ownership of said lands, and that if same now be sufficient, that same is tendered to the Defendants herein and in any event, that the Judgment of the Court should provide and the Plaintiffs here now tender out of said oil runs, royalties and other things of value paid as a part of the ownership of said land, such an amount of said oil runs in the future if same be necessary which would fully restore to the Defendants herein the sum of $105,000.00 herein paid.

As a part of its suit, Plaintiffs seek to recover possession of certain mineral interests. These mineral interests

constitute land or an interest in realty under the laws of the State of Texas under the well recognized doctrine that oil and gas in place are realty. However, since the fraudulent transactions which plaintiffs complain of, Defendants have brought oil and gas from its place under the surface to the top of the ground where it is ordinarily considered to be personalty. Nevertheless, under the rules of equity, particularly the doctrine of equitable conversion, defendants should not be permitted to defeat plaintiffs' recovery of all that was taken from them by the technical distinction between personalty and realty. Equity regards as done that which should have been done and the Court is entitled to disregard the attempted conversion of the oil and gas interests into personal property and is entitled to declare that the oil and gas runs are realty under the doctrine of equitable conversion.

For all of the foregoing reasons, good cause exists for an order of the Court requiring defendants to produce the record showing the facts and circumstances surrounding the removal of all minerals and each instance of removal of any minerals from the lands in question including the dates, quantity, quality, purchaser and all other information pertinent thereto such as may be disclosed by reports of pumpers, gaugers, pipelines, purchasers, division orders and financial records or records of disbursements.

7.

None of these documents constitute written communications passing between agents or representatives or the employees of any party to the suit, or communications between any party and his agents, representatives or their employees made subsequent to the occurrence or transaction upon which the suit is based and made in connection with the prosecution, investigation or defense of such

claim, or the circumstances out of which same has arisen. Any of these documents or things which were made subsequent to the occurrence or transaction upon which this suit is based were not made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen.

WHEREFORE, movants pray that upon notice to all other parties and subject to such limitations as the Court may impose, that this Honorable Court order Socony Mobil Oil Company, Inc. to produce and permit the inspection and copying or photographing by or on behalf of the moving party of all of the foregoing designated documents, papers, books, accounts, letters, photographs, objects or tangible things, and further that the Court enter its order specifying the time, place and manner of taking the copies and photographs, and shall prescribe such terms and conditions as are just and that movants have such other and further relief, both special and general, at law or in equity, as they may show themselves justly entitled to receive, either at law or in equity.

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EXHIBIT E

APPENDIX "B"

"No. 3583

MARION J. BELVEAL, ET AL
vs.
SOCONY MOBIL OIL COMPANY, INC., ET AL

In the District Court of Pecos County, Texas 83rd Judicial District

Order for Discovery and Producing of a Document, etc.

On this day came on to be considered a Motion of Plaintiffs that the Court order defendant, Socony Mobil Oil Company, Inc. to produce and permit the inspection and photographing or copying by and on behalf of such moving party of certain designated and described desired documents or things as set out in said motion and it appearing that defendant has been given notice of such motion and that such motion shows good cause, as in truth there is, and should be granted, it is accordingly ordered:

That defendant, Socony Mobil Oil Company, Inc., be and it is hereby ordered to produce at the office of the District Clerk at the Courthouse of Pecos County, Fort Stockton, Texas, at 10:00 o'clock a.m. on the 5th day of January 1967, and to let such documents or things remain until plaintiff has had opportunity to inspect, photograph and copy all of them, the following and described documents or things:

(a) A document entitled Executive Position Description for Staff Landman, Incumbent J. K. Brim, Jr., of May 19, 1960.

(b) A document entitled Executive Position Description for Division Landman of May 16, 1960.

(c) Agreement dated June 27, 1961, between Mobil and Sun Oil Company providing that Mobil would drill a deep well in the Coyanosa area concerning Section 47, in Block OW, Pecos County, Texas.

(d) Letter of May, 1962, pertaining to such agreement described in "C" above.

(e) Letter dated March 22, 1961, pertaining to such agreement described in "c" above

(f) The following papers, documents or things which were produced at exploration conference meetings attended by J. K. Brim, Jr. as staff landman and/or division landman insofar as same pertains to any of the lands or interests described in the deeds which plaintiff has brought suit to set aside.

(1) letters
(2) papers
(3) memoranda
(4) documents
(5) maps
(6) surface maps
(7) ownership maps
(8) geophysical maps
(9) geological maps
(10) geological information
(11) reports
(12) opinions
(13) analyses

(g) With respect to the lands described in the deeds which plaintiff has brought this suit to set aside, produce records or copies thereof showing the following facts, circumstances surrounding the removal of all

minerals from such lands and of each instance of such removal of any minerals.

(1) date
(2) quantity
(3) quality
(4) purchaser
(5) pumpers' reports
(6) gaugers' reports
(7) pipe line records
(8) purchasers
(9) division orders
(10) records of disbursement or financial records

The taking of such copies and photographing may be done by any reasonable method which does not materially damage the thing or document being copies or photographed. Such copying, inspecting and/or photographing must be done on the premises of the Pecos County Courthouse unless consent to other arrangement is given by defendant or its agent or attorney. The agent or attorney of defendant may be present at all times while any inspection, photographing or copying of such papers, document or thing is being carried out by plaintiffs. Such inspection, photographing or copying may be done in person by plaintiffs or by their designated agents or attorneys.

SIGNED AND ENTERED this 31 day of December, 1966.

/s/ C. E. Patterson
Judge Presiding"

EXHIBIT EA

No. 5926

IN THE
COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL DISTRICT

MARION J. BELVEAL, ET AL.,
Petitioners

vs.

SOCONY MOBIL OIL CORPORATION AND CHARLES B. ATHEY and JACK D. HODGDEN,
Respondents

Motion for Recall and Stay of Judgment Issued As Mandate

(Filed May 9, 1969)

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now come the petitioners in the above entitled and numbered cause, and pray for recall and stay of the judgment issued as mandate in the above entitled and numbered cause in order to enable petitioners to apply for and attempt to obtain a writ of certiorari from the Supreme Court of the United States, and in this connection petitioners would show:

1.

That the Motion for Rehearing of the Application for Writ of Error in the above entitled and numbered cause was overruled on March 5, 1969; that under the law petitioners have ninety (90) days in which to perfect an appeal to the Supreme Court of the United States, and while peti-

tioners do not believe that it is necessary that the mandate be recalled in this case, still it would appear that the proper mode of procedure would be for the mandate to be recalled since it is quite evident that this Court could not destroy the constitutional and statutory right of petitioners to file the petition for certiorari within the time provided by law, and petitioners further recognize that it is not the desire of this court to destroy petitioners' right of appeal.

WHEREFORE, petitioners pray that this Court enter an order recalling and staying the judgment as mandate, and in this connection petitioners herewith tender a suggested form of order for this Honorable Court to enter, a copy of which has been furnished to all parties, together with a copy of this Motion, and pray for such other and further relief as petitioners may be entitled to receive.

Respectfully submitted,

Watts and Patterson
P. O. Box 1031
Odessa, Texas
V. F. Knickerbocker
P. O. Box 1132
Midland, Texas
By: /s/ John J. Watts
Attorneys for the Petitioners

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, J. W. Florence, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on three pages, is a full, true and correct copy of appellees' Motion For Recall And Stay Of Judgment Issued As Mandate, filed in this Court on the 9th day of May, A.D. 1969, in cause No. 5926, styled:

Socony Mobil Oil Corporation and Charles B. Athey and Jack D. Hodgden,
Appellants,

v.

Marion J. Belveal, et al.,
Appellees.

IN WITNESS THEREOF, I hereunto set my hand and affix the seal of said Court, at El Paso, this the 21st day of May, A.D. 1969.

J. W. Florence
Clerk
By /s/ R. E. Strassburger
Deputy

(Seal)

EXHIBIT EF

No. 5926

IN THE
COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL DISTRICT

MARION J. BELVEAL, ET AL.,
Petitioners

vs.

SOCONY MOBIL OIL CORPORATION and CHARLES B. ATHEY AND JACK D. HODGDEN,
Respondents

APPEAL FROM EL PASO COURT OF CIVIL APPEALS
SITTING AT EL PASO, TEXAS

Order Recalling and Staying Judgment Issued As Mandate

(Filed May 21, 1969)

ON CONSIDERATION of the Motion of petitioners for recall and stay of judgment issued as mandate in the above entitled and numbered cause, to properly insure that petitioners may apply for and attempt to obtain a writ of certiorari from the Supreme Court of the United States, it is ORDERED that the Judgment of this Court to be issued as mandate to the Clerk of the Trial Court be stayed for a period of ninety (90) days from March 5, 1969, the stay to remain in force until the final disposition of the case by the Supreme Court of the United States, and provided further that within the period of ninety (90) days from March 5, 1969, that there shall be filed with the Clerk the certificate of the clerk of Supreme Court that certiorari petition and record have been filed. It is

further ordered by this Court that the clerk shall issue the judgment as mandate upon the filing of a copy of the order of the Supreme Court denying the writ, and that same shall issue unless the above mentioned certificate shall be filed with the Clerk of this Court within the ninety (90) days above specified

ENTERED this 21st day of May, 1969.

/s/ Alan R. Fraser,
Chief Justice, Eighth Court
of Civil Appeals

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, J. W. Florence, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on two pages, is a full, true and correct copy of the Court's Order, dated May 21st, A.D. 1969, granting appellees' Motion For Stay Of Judgment Issued As Mandate, in cause No. 5926, styled:

Socony Mobil Oil Corporation and Charles B. Athey
and Jack D. Hodgden,
Appellants,

v.

Marion J. Belveal, et al.,
Appellees.

IN WITNESS THEREOF, I hereunto set my hand and affix the seal of said Court, at El Paso, this the 21st day of May, A.D. 1969.

J. W. Florence
Clerk
By /s/ R. E. Strassburger
Deputy

(Seal)

EXHIBIT F

POINT No. 12

The opinion in this case taking from Appellees a judgment calling for the imposition of a constructive trust on lands wrongfully taken from Appellees and cancelling the reconveyance of said lands by the Trial Court to Appellees by the opinion in this case and calling for an affirmance of Mobil's lease, as a matter of law, and for a reversal and remand for fact determination between the other parties here involved, and calling and requiring the making of new parties and proof of title as required in trespass to try title cases, constitutes such a wide and unusual departure from established principles of law in the administration of justice that said opinion deprives Appellees herein of their Constitutional rights under the Fourteenth Amendment of the Constitution of the United States which provides in part, ". . . nor shall any State deprive any person of . . . or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

EXHIBIT G

POINT No. 19

The Honorable Court of Civil Appeals erred in holding that after the deeds were canceled there was nothing for Respondents to convey since cancellation of the deeds was not a prerequisite under Texas law to the imposition of a constructive trust and an order directing Respondents to reconvey by deed title to Petitioners in that by this judgment of the Trial Court the first seven set of deeds, as well as the second seven set of deeds were all determined to be void and no legal effect and after the Trial Court's judgment calling for a reconveyance was complied with, all prior deeds were effectively set aside.

EXHIBIT H

POINT No. TWENTY

The Honorable Supreme Court of Texas erred in refusing Petitioners' Application for Writ of Error, N.R.E., and in effect overruling Point No. 13 of Petitioners' Application for Writ of Error on file in this Court, which Point was as follows, to-wit:

> "The Honorable Court of Civil Appeals erred in going further than merely reversing on its merits the Summary Judgment canceling Mobil's lease in that under settled law, as declared by the Supreme Court of Texas, no appeal lay from the order of the Trial Court refusing judgment to Respondents and the motion of the Petitioners for Summary Judgment afforded no basis for a judgment in favor of the Respondents and this is particularly true in this case wherein the refusal of Respondent Mobil to comply with the Trial Court's order of discovery effectively prevented the Petitioners from proving the fraud of Mobil to the satisfaction of the Court of Civil Appeals with reference to when fraud occurred with reference to Mobil's procurance of the lease extension agreement and Petitioners say alternatively that if summary judgment calling for cancellation of Mobil's lease is not affirmed on rehearing by this Court, then in such event, this cause as to the issue of cancellation of the lease should be reversed and remanded for enforcement by the Trial Court of the Court's previous orders of discovery in order that the evidence as to this issue may be fully developed for the determination of the Trial Court or jury."

EXHIBIT I

The affidavit of J. K. Brim was as follows:

No. 3583

In the
DISTRICT COURT OF PECOS
COUNTY, TEXAS
83rd Judicial District

MARION J. BELVEAL, ET AL

v.

SOCONY MOBIL OIL COMPANY, INC., ET AL

STATE OF TEXAS)
COUNTY OF HOPKINS)

Affidavit

Before Me, the undersigned authority, a Notary Public in and for Hopkins County, Texas, on this day personally appeared J. K. Brim, Jr., who being by me here and now duly sworn, upon oath says:

My name is J. K. Brim, Jr. and I am one of the defendants in the above entitled and numbered cause. Back in the early part of 1961, as set out in my deposition, I was advised by the land department of Mobil Oil Company that there was an undisclosed trust affecting the Belveal interest and that of a number of other parties not involved in the present suit and I was instructed that one Charles B. Athey, a defendant in the present suit, was acting as a trustee for all of said parties, and having theretofore been advised by Mobil Geophysical Department that the properties appeared to have great potential for oil and gas production and having been shown oil maps and

geophysical structure maps showing the probable value of same, I was instructed to try to get the said Athey to procure a Power of Attorney from all parties so that we could get an extension of a lease involving said property that was about to expire. I, acting solely as the agent for Mobil and for no one else and not for myself, did contact the said Charles B. Athey and convey to him the information that the property appeared to have great potential as oil and gas producing property, that well was to be drilled to the Ellenberger and that it would be wise for him to secure a Power of Attorney so that he could represent the other parties, including the Belveales' and in order that he might renew and execute leases and I then advised him that a well was to be drilled to the Ellenberger on adjacent property and that said property appeared to be valuable. He advised me that he would contact the various owners for the purpose of getting the Power of Attorney from the Belveals' and others and thereafter, he did procure a Power of Attorney and executed an extension on said lease. Thereafter, the title department of Mobil and I, acting at their instruction and on their behalf, prepared a designation of interest instrument in an effort to render any defects which might be existing in said lease curable. At said time I was acting strictly as an agent and employee in the course of my employment for Mobil and was doing my best to represent my principal and had violated no interest of Mobil in any manner or to any extent and violated no rules or regulations of Mobil, but acted completely in accord with what Mobil had instructed me to do.

/s/ J. K. Brim, Jr.
J. K. Brim, Jr.

Subscribed and Sworn To Before Me, by the said J. K. Brim, Jr. this 7th day of February, A. D. 1967, to certify which witness my hand and seal of office.

/s/ Gene Bening
(Seal) Notary Public in and for Hopkins County, Texas

EXHIBIT J

Conclusion

The Appellees have been defrauded. The Appellants have been unjustly enriched, and this Honorable Court has, without adequate excuse in the law, disregarded the theory of constructive trust, and is now requiring these Appellees to make parties whose interests are not involved, new parties to an action that does not cover the principles involved in this lawsuit of constructive trust. In so doing, the opinion in this case becomes an *instrument of oppression and injustice insofar as the rights of Appellees are concerned;* and we respectfully request this Honorable Court to reconsider the law and facts and upon such reconsideration to grant this Motion for Rehearing, and to sustain the Trial Court's Judgment.

The Appellees feel strongly and urge most respectfully and sincerely that the opinion of this Honorable Court depriving them, without just cause, of the property on which the Trial Court imposed a constructive trust and on which property the Trial Court correctly called for conveyances by the responsible Appellants so as to require the making of new parties and a trial by jury is wholly unauthorized and constitutes such a departure from the established law of both Texas and the Federal Courts, including all judicial concepts for the proper administration of Justice, as deprives Appellees of their rights under the Fourteenth Amendment of the Constitution of the United States.

This point must be here raised in order that it may be considered by this Court and by the Supreme Court of Texas, and by the Supreme Court of the United States if such action becomes necessary.

Our Fifth Circuit has firmly established in *Randel* v. *Reto*, 354 F. 2d 496 (cert. dis.), that the conclusion of the Texas Court of Criminal Appeals that Appellant was not denied his constitutional right to trial by jury under Texas State Constitution was not binding on Federal Courts with respect to any constitutional right of trial by jury guaranteed by the Federal Constitution, nor with respect to due process of law clause of the Fourteenth Amendment, U.S.C.A., Constitution, Amend. 13, §2, Amendments 6 to 14, is in point here. Under the clear terms of this Amendment, it applies to—"life, liberty, or property."

The rights of the Appellees to summary judgment under valid state rules should not be lightly taken away and an entire cause of action destroyed of constructive trust because this Court chooses to call it one in trespass to try title without any basis in law supporting such a decision as we have specifically set out in this motion for rehearing and in our original brief.

A review of the cases of the Supreme Court of Texas and the Supreme Court of the United States, all of which have been discussed in great detail in our original brief, shows that no principle has been more sacredly or jealously guarded than the right of parties defrauded by a trustee to impose a constructive trust in cases where the trustee and those claiming under him are unjustly enriched.

Courts of equity will not and should not permit a trustee to get by with what Athey, with the help of Hodgden and Brim acting for Mobil, here pulled.

This action calls for condemnation of the parties Appellants as well as affirmance of the Trial Court's judgment by this Honorable Court. No stronger or more appropriate words can be found to close this motion with than the words of Judge Hutcheson when the Fifth Circuit

reversed the lower Court's judgment and held that the plaintiff was entitled to recover as a matter of law with this language:

> "While the facts of this case indicate that Appellee did not exercise good faith in procuring the quit-claim deed, it is not necessary for us to so hold, for under the circumstances here, the failure of the fiduciary to make a complete and fair disclosure of all of the material facts relevant to his father's estate constituted fraud as a matter of law and evidences conduct *which a court of conscience will not tolerate.*
>
> It follows that the Trial Court's finding to the contrary is clearly erroneous and must be set aside."

Murphy v. *Cartwright*, 5th Cir., 202 F. 2d 71.

This decision was recognized as controlling law by the Eastland Court in a companion case in which counsel for Mobil, the Honorable Bill Browder, represented the losing party. See *Cartwright* v. *Minton*, 318 S.W. 2d 449 (writ of err. ref.)

In this case, the Texas Court said in part, speaking of the duty of one occupying a fiduciary relationship such as Athey:

> "It was his duty to fully and fairly disclose to her all of the pertinent facts as candidly as possible. The law will not permit him to take advantage of those whom he represents."

How can this Honorable Court ignore this kind of law so clearly revealed by all of the evidence in this cause by necessary pleadings and correct judgment in this cause without denying to Appellees' due process of law as guaranteed by the Fourteenth Amendment?

It is to be noted that in the Federal Court in Cartwright it was the quit-claim deeds procured in bad faith that the 5th Circuit disregarded as a matter of law.

The equity and the conscience of this case and of this court requires that this Court in similar fashion disregard the first set of deeds and affirm the judgment of the Trial Court on the breach of the fiduciary Athey's duties to Appellees and those claiming under him who had notice and knowledge.

We apologize to this Honorable Court for the necessity of raising the claim of denial of due process and of equal protection, since we realize that this learned and Honorable Court has spent months in good faith studying the record in this case, but we do not comprehend any basis in law or in equity for the opinion which requires such harsh and unnecessary action as the opinion requires in order that the sacred property rights of Appellees may be preserved.

We likewise recognize that this is an unchartered sea upon which we sail. We further recognize the difficulty of procuring a review by the Supreme Court of Texas once this Honorable Court has held a matter, a question of fact for the determination of the Jury, but the Supreme Court of the United States has in many recent decisions, including the recent Midland County Redistricting decision, breathed new life into these Constitutional provisions, and we would be remiss in our duty to our seriously aggrieved clients who have suffered imponderable delay at their elderly ages if we did not raise each point that we feel that we are legally required to raise in order to insure that their Constitutional rights are preserved.

Rule 170, T.R.C.P. is likewise of great importance to the orderly development and preservation of impartial trials wherein efforts of a party to secure the truth under order of the Court should not be destroyed by the whims and caprices of counsel for Appellant Mobil, or by any other counsel in any other cause.

In the face of this record this Honorable Court has by its refusal to enforce this rule, placed its implied stamp of approval upon the open defiance of not only the rule, but of a solemn order entered by a Trial Court who had the full right to enter the order and to exact the penalty of a default judgment if needed for its disobedience.

In this connection, we feel that the failure to enforce Rule 170 amounts to denial of due process in administrative proceedings of a judicial nature which generally requires conformance to fair practices of Anglo-Saxon jurisprudence, and this is usually equated with adequate notice and fair hearing. Hornsby v. Allen, C.A. Ga. 1964, 326 F. 2d 605, rehearing denied 330 F. 2d 55.

Due process in administrative proceedings of a judicial nature requires that parties be allowed opportunity to know opposing parties' claims, to present evidence to support their contentions, and to cross-examine opposing parties' witnesses.

The Supreme Court of Texas in *Rogers* v. *Royalty Pooling Company*, 302 S.W. 2d, in a per curiam opinion held as follows:

> "(1-3) At the same time the appellate court, while correctly reversing, on the merits, the summary judgment rendered for the petitioner (appellee), *erred in going further and rendering judgment for the respondents (appellants)* since no appeal lay from the order of the trial court refusing summary judgment to the respondents, and the motion for summary judgment of the petitioner (appellee) afforded no basis for a judgment in favor of the respondents (appellants). In this behalf the judgment below conflicts with our own decision in Wright v. Wright, 154 Tex. 138, 274 S.W. 2d 670. This being so, we have elected to exercise the authority provided for such situations in the latter portion of Rule 483, Texas Rules of Civil Proce-

dure, and hereby reverse 'on the application for writ of error', remanding the cause to the district court for such further proceedings as may be appropriate."

The rule in *45 Tex. Jur. 2d*, p. 685, likewise supports the points urged by Appellees that judgment should not be rendered as a matter of law as to cancellation of Mobil's lease by the Honorable Court of Civil Appeals, wherein the following is stated:

> "In reversing a summary judgment where there has been no trial on the merits, judgment will not be rendered by the appellate court if there is any matter of fact to be determined, or if justice may be better served by a remand. And a court of civil appeals though correctly reversing, on the merits, a summary judgment rendered for the plaintiff, errs in going further and rendering judgment for the defendants, since no appeal lies from the trial court's order refusing summary judgment to the defendants, and the plaintiff's motion for summary judgment affords no basis for a judgment in favor of the defendants. Again, a court of civil appeals is without power to direct a district judge by mandamus to enter any particular character of judgment on a motion for summary judgment. But where summary judgment has been erroneously granted because of failure to show that there is no genuine issue as to any material fact, remand does not imply a necessity for a trial on the merits if *under additional pleadings, admissions or evidence it is conclusively determined that no genuine issue of fact exists.*"

EXHIBIT K

Response of Petitioners Challenging As Untrue Certain Statements Made in the Last Response Filed by Mobil Oil Corporation

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners challenge as untrue and material part of the following portion of Respondent Mobil Oil Corporation's response to petitioners motion for rehearing, on page 3 of said responses:

> "They cannot find in the record (for indeed it is not there) any order of the court reciting contempt on the part of Mobil or its attorneys. This is a full and complete answer to petitioners' claim of a violation of due process rights.
>
> "The Petitioners, however, go outside the record to claim that such disobedience did occur; *perhaps we can be forgiven if we support the record as it is before this court by asserting that there was no disobedience, no disregard of the trial court discovery order.*
>
> "Respondent's counsel Tom Sealy and Jack Akin took Mobil's records to Fort Stockton for examination by petitioners' counsel as called for in the trial court discovery order. For whatever reason there might have been, Mr. Watts did not appear in Fort Stockton for examination of the records. The records were returned to Midland by Mr. Sealy and Mr. Akin."

This statement is absolutely false as to the portions italicized as above set out and hereinafter italicized. It is true that Tom Sealy and Jack Akin took an old map or maps, together with a tax analysis purporting to show the question of Mobil's knowledge of the value at the time that Mobil procured their lease and it is true that petitioners' counsel had two expert witnesses go to Fort Stockton for the purpose of looking over this alleged information and

that V. F. Knickerbocker, of counsel for petitioners, examined same.

It is further true that John J. Watts was not present to examine the scanty records, if they can be called such, which Mobil produced in such a cat and mouse manner in carrying out their game of hide and seek.

The records thus furnished by Mobil shed no light whatsoever upon the real issues in this case and neither did it constitute even a partial compliance with the order of the trial court for discovery.

None of these important records were produced. As a matter of fact, to show the utter falsity of the claim as made by respondent's counsel, who undoubtedly must be acting out of a sense of desperation, show that this summary judgment was entered on March 30, 1967 (Tr. Vol. 4, p. 1221) by the District Court of Pecos County, Texas.

Thereafter, the petitioners filed in the United States District Court for the Western District of Texas *a motion to compel the return of exhibits, which said motion is styled as Exhibit* "A" *and a certified copy of same is attached to this record for the purpose of verification.*

It is most difficult to understand how any court could believe that Mobil had complied with the trial court's order of discovery in view of this motion made after the summary judgment here on appeal was entered.

This contention of petitioners as to the falsity of Mobil's claim is likewise shown by the answer of respondents which was filed in the Federal Court at Pecos, and Mobil at that time was *still contesting the return of these exhibits called for by the order of discovery of the Pecos County trial court.*

The United States District Court has never acted upon this motion even though a hearing was had thereafter in El Paso before the Honorable Ernest Guinn.

Respondents admit, in effect, that due process has been denied if petitioners are right concerning Mobil's failure to comply with the trial court's order of discovery.

It is true that there was no order of the trial court entered citing Mobil for contempt, but petitioners suggest that this is immaterial.

The trial court had two alternatives. He could either cite Mobil for contempt or he could enter a default judgment against Mobil by means of a summary judgment, as the trial court undoubtedly had the right to do under Rule 107, T.R.C.P., for respondent's failure to comply with the discovery order. This the trial court did, and this point is urged in petitioners' Point No. 5 of the Motion for Rehearing.

Petitioners further submit that the action of the El Paso Court without giving Petitioners an opportunity to examine the evidence called for by the order of discovery is clearly erroneous.

The facetious argument is made by Mobil that petitioners assume a false position in that petitioners claim that their motion for summary judgment as against Athey and Hodgden was good but that the summary judgment of Mobil constituted a denial of due process.

On Page 2 of their response, Mobil *claims that this is a novel concept.* That "*. . . it can be stated only through considerable craft and imagination.*" We respectfully submit that this argument is wholly without foundation as shown by the record in this cause.

In Athey's case we are dealing with a judicial admission of wrongdoing by a defendant who was also a trustee of petitioners, which was binding upon the defendants Athey and Hodgden. This kind of matter cannot be explained away in any fashion on a new trial but Athey is bound by such judicial admission or wrongdoing. *This would constitute a clear ground for summary judgment against Athey.*

As to Mobil, the El Paso Court of Civil Appeals has held their lease good when it is clearly apparent from the affidavit and deposition of Brim, which is before this Court, as well as from the *failure of the respondent to comply with the trial court's order of discovery, that no adequate opportunity was ever given on* the motion for summary judgment for petitioners to show when Mobil's fraud began.

We have further pointed out that under the Supreme Court decision in Rogers v. Royalty Pooling Company et al., 320 S.W. 2d 938, there is a clear error in the El Paso Court's going further and rendering judgment for the respondents under the facts of this case, since to do so misplaces the burden of proof in such a way as to deny due process to the petitioners herein as is so well discussed and set forth in the United States Supreme Court decision in *Armstrong v. Manzo,* 380 U.S. 545, discussed on pages 34 and 38 of the Brief of petitioners in support of motion for rehearing.